FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, Appellant,

vs.

WALTER A. DOBLER.

Brief for Appellee

IN THE

Supreme Court of the United States.

October Term, 1904.

UNITED STATES, *Appellant*,
v.
WALTER S. CROSLEY. } No. 96.

BRIEF FOR THE APPELLEE.

Statement.

This is an appeal by the United States from the judgment of the Court of Claims allowing to the claimant, who was a lieutenant in the United States Navy, serving as aid to a rear admiral, the pay allowed to an aid to a major-general in the army.

The claim is based upon that portion of section 13 of the act of March 3, 1899, known as the Navy Personnel Act (30 Stat. L. 1007), which gives to commissioned officers in the line of the navy "the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army."

The claimant as a lieutenant, junior grade, in the navy corresponds in rank to a first lieutenant in the army (Revised Statutes, § 1466; Act of March 3, 1883, 22 Stat. L. 472). He received pay as follows:

Pay of a first lieutenant in the army, under Revised Statutes, § 1261	$1,500
Longevity pay under Revised Statutes, § 1262 for second five years of service	150

He claims to be entitled to the additional pay received by a first lieutenant in the army serving as an aid to a major-general, as follows:

Pay as aid to rear-admiral, an officer of corresponding grade to major-general, under Revised Statutes, § 1261	$200 00
Mounted pay due under Army Regulations of 1895, paragraph 1301, to "authorized aids duly appointed"	100 00
Longevity pay upon the last two items under Revised Statutes, § 1262	30 00

During a portion of the time covered by the claim he was entitled to two installments of longevity pay, increasing the amount of his pay but not affecting the principle involved. This is fully stated in the petition (rec. pp. 1–2).

Statutes.

The following statutes are relevant:

Act of March 3, 1899, § 13, Navy Personnel Act (30 Stat. L. 1007):

"That after June 30, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Revised Statutes, § 1098:

"Each major-general shall have three aids, who may be selected by him from captains or lieutenants of the Army."

Revised Statutes, § 1261:

"The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * * First lieutenant, mounted, sixteen hundred dollars a year; first lieutenant, not mounted, fifteen hundred dollars a year, * * aid to major-general, two hundred dollars a year, in addition to the pay of his rank."

Revised Statutes, § 1262:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

Revised Statutes, § 1466:

"The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

* * *

"Rear-admirals with major-generals

* * *

"Masters with first lieutenants."

Act of March 3, 1883 (22 Stat. L. 472):

* * * "One hundred masters, the title of which grade is hereby changed to that of lieutenants, and the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters. * * *

Regulations.

Navy Regulations of 1896, Paragraphs 343, 345:

"The chief of staff, flag lieutenant, clerk, and aids shall constitute the personal staff of a flag officer."

"(1) A flag officer may select any officer of his command

to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344.

"(2) He may also, when necessary, select other line officers junior to the flag lieutenant to serve on his personal staff as aids, but shall not assign naval cadets to such duty."

Army Regulations of 1895, Paragraph 131:

"The following officers, in addition to those whose pay is fixed by law, are entitled to pay as mounted officers: Officers of the staff corps below the rank of major, officers serving with troops of cavalry, officers of a light battery duly organized and equipped, authorized aids duly appointed, officers serving with companies of mounted infantry, and officers on duty which in the opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

Defenses.

Two defenses are raised in the appellant's brief.

Pay for Services as Aid.

The first relates to the whole claim. It is said that aid's pay is pay for special service and not pay due to rank. Consequently it is argued that the Personnel Act does not give this extra pay as that grants the pay of "officers of corresponding rank in the army."

Officers of the navy are granted by the Personnel Act "the same pay and allowances" as officers of the army. These words are used to describe the "entire compensation" of an officer of the army (*Emery* v. *United States*, 19 C. Cls. 266) and the evident purpose is that with the exception named in the act (forage) naval officers shall have what army officers receive.

The principle is well stated in the opinion of the Court of Claims in the case of *Thomas* v. *United States*, 38 C. Cls. 127, 128, upon the question of sea ration.

"The only allowance excepted is for forage, while the only exception in pay is, as set forth in the first proviso, 'that such officers, when on shore, shall receive * * * fifteen per centum less pay.'"

* * * * * * *

"The words 'same pay and allowances' would seem to indicate that the Congress intended, except as therein provided, to conform the pay and allowances of the commissioned officers of the line of the navy and of the medical and pay corps to the pay and allowances of 'officers of corresponding rank in the army.'"

The decision of the Court of Claims on that question was sustained by this court in *Gibson* v. *United States*, 194 U. S. 182, 192. This court there said:

"This section was intended to cover and in exact terms provides for all pay and allowances for naval officers except forage. Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for army officers of corresponding rank."

The Court of Claims in applying this general doctrine to this case in the opinion herein (Rec. p. 8) said as follows:

"The additional pay to the army officer is in the nature of an allowance. It goes to his rank, depends on rank, and is extra pay for special service. In the case of a naval officer duly appointed aid to a rear-admiral the extra pay is likewise for rank and special service. The Navy Personnel Act attempted to assimilate the pay, and did so as far as conditions admit of the application of the act. It is not for the courts to add to or take from the act where the pay for a similar service rendered by a naval officer can be assimilated to that of an officer of corresponding rank in the Army."

The discrimination attempted to be made by the United States between pay for rank and pay for special duty clearly violates this principle of equality of pay. No reason can be given why such a discrimination should be maintained, and in fact the Government frankly admits that the omission maintained in its brief was (p. 5) "very likely by oversight."

Variable Rates of Army Pay.

The distinction does not find any root in the statute itself. Section 1261 of the Revised Statutes gives to the rank of first lieutenant two different rates of pay, "mounted" and "not mounted." These rates of pay vary under section 1262 according to the length of service of these officers. They may draw additional pay while serving as aids to brigadier or major-generals. On foreign service, after May 26, 1900, they may receive ten per cent increase of pay under the acts of May 26, 1900, and March 2, 1901 (31 Stat. L. 211, 903). Revised Statutes, § 1265, adds another rate of pay to all officers, that is, half pay while on leave beyond thirty days a year. Thus a first lieutenant in the army, depending upon whether he is on duty or on leave, at home or abroad, of recent entrance in the army or of long service, may receive no less than sixty different rates of pay as set forth in the following table:

TABLE OF PAY OF AN ARMY FIRST LIEUTENANT:

	Not mounted.	*Mounted.*	*Aid to Brig. Gen.*	*Aid to Major-Gen.*
1st 5 years.				
Home duty	$1500	$1600	$1750	$1800
Foreign service	1650	1760	1925	1980
Absent with leave	750	800	875	900
2d 5 years.				
Home duty	1650	1760	1925	1980
Foreign service	1815	1936	2117 50	2178
Absent with leave	825	880	962 50	990
3d 5 years.				
Home duty	1800	1920	2100	2160
Foreign service	1980	2112	2310	2376
Absent with leave	900	960	1050	1080
4th 5 years.				
Home duty	1950	2080	2275	2340
Foreign service	2145	2288	2502 50	2574
Absent with leave	975	1040	1137 50	1170
After 20 years.				
Home duty	2100	2240	2450	2520
Foreign service	2310	2464	2695	2772
Absence on leave	1050	1120	1225	1260

When an officer of a single rank may receive all these rates of pay, how fallacious it is to say that in putting officers of the navy upon the pay of officers of corresponding rank in the army Congress meant to single out one or more of these rates for the navy and destroy the principle of equality which the act plainly asserts. First lieutenants in the army receive pay made up of grade pay, longevity pay, foreign duty pay, mounted pay or pay for special duty, besides allowances. The supposed "pay for rank" can not be the "pay and allowances" intended by the Navy Personnel Act.

Intent of the Law.

In the case of *United States* v. *Thomas* just decided this court held that in construing together the Personnel Act and army pay statutes, the intent of Congress could be ascertained by inquiry into the effect in actual administration of the literal application of army pay laws to the navy. The army law giving increased pay for service

outside the United States was held not to apply to the navy because the navy was performing its usual duty when outside the United States and should therefore receive but its usual pay. The same principle requires that the army grant of pay to an aid to a major-general should also be applied to an aid to a rear-admiral since the duties are identical and the reasons for the one receiving the pay apply with equal force to the other.

"The key to the opening of every law is the reason and spirit of the law,—it is the '*animus imponentis*,' the intention of the lawmaker expressed in the law itself taken as a whole." (*Brett* v. *Brett*, 3 Add. Eccl. 210, quoted in Black on Interpretation of Laws, 167.) It is this principle which this court expressed and followed in construing this statute in *Rodgers* v. *United States*, 185 U. S. 83, and in *Gibson* v. *United States*, 194 U. S. 182. The clear intent of this law is equality between the army and navy and that intent has been violated in the refusal to pay this claimant the sums here claimed.

Mounted Pay.

Upon the question of mounted pay the defense is based upon a misunderstanding. The Army regulation, paragraph 1301, under which aids to major-generals draw mounted pay provides mounted pay whether the officer is or is not mounted. Section 1272 of the Revised Statutes gives forage to officers only for horses actually kept by them in service, but mounted pay is granted without regard to the question whether an officer has or has not a horse in service.

Thus by § 1168 of the Revised Statutes, assistant surgeons have the rank of lieutenant or captain of cavalry, while chaplains by § 1122 have the rank of captains of infantry, although the surgeon may be in a hospital, not requiring a horse, and the chaplain may be in the

field and need to be mounted. By the act of July 8, 1898, 30 Stat. L. 729, volunteer chaplains have "the pay and allowances of a captain mounted." No reason is shown why chaplains of volunteers need horses more than chaplains of the regular army; the distinction is one of pay.

Engineer officers of the army, being officers of staff corps, are all paid mounted pay under this regulation, although the duties of engineer officers in time of peace are to superintend river and harbor improvements, having their offices in cities and making their tours of inspection by railroad and steamboat.

The Court of Claims has well said of this question in its opinion in this case (rec. p. 9):

"The Army regulation gives the pay of mounted officers 'to authorized aids duly appointed.' But mounted pay is not always synonymous with mounted service, as there may be mounted pay without actual mount. An officer in the Army serving as an aid may sometimes be where, in the performance of duty, he can not be mounted. Again, such an officer may sometimes be where he can be mounted and yet where he is not mounted. An aid to a general doing duty on some small island or at the seat of government either can not use a horse or he may not have one. Nevertheless, the statutes in such cases provide the mounted pay, despite the actual conditions which may prevent the use of a horse in the one case or render unnecessary the keep of a horse in the other. The officer in such cases would only be deprived of the allowance of forage."

In a similar case, involving the right of the Medical Corps of the navy to mounted pay, the Court of Claims said in *Richardson* v. *United States*, 38 C. Cls. 194:

"The disallowance of forage was a discrimination against the officer of like grade or rank in the Navy, because the necessity of forage did not exist, and, therefore,

the right is not incident to the officer serving in the Navy, but in all other particulars his pay was left equal to the officer of like rank in the Army. The pay of the rank is taken as the basis of the pay of the claimant, and it is not based upon the theory that he may be mounted, but upon the basis that mounted pay is designated as the measure of his compensation."

This decision of the Court of Claims was not appealed to this court but accepted by the Attorney-General, and following this officers of the medical corps of the navy were paid mounted pay (9 Comp. Dec. 676). The Comptroller of the Treasury subsequently decided that officers of the pay corps of the navy are also entitled to mounted pay because officers of the pay corps of the army are given by law "the rank of captain mounted," they being among the officers recognized by the Army Regulations of 1895, Par. 131, as mounted officers.

The Comptroller says (10 Comp. Dec. 528):

"A careful examination of the numerous acts relating to the pay of army paymasters shows that their pay has always been assimilated to light dragoon or cavalry pay where such pay was greater than infantry pay.

"This fact is strongly persuasive, and I think that Congress has sufficiently shown its intention to make cavalry or mounted pay the measure of the compensation of paymasters of the army, and of extending the same kind of pay to paymasters of the navy by enactng in the Navy Personnel Act (30 Stat. L. 1007), that—

"'Commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army.'

"I am of opinion, therefore, that officers of the pay corps of the navy are entitled to mounted pay."

It thus appears that it has not seemed anomalous either to the Court of Claims or to the Comptroller of the

Treasury to give mounted pay to officers of the navy, because the right to mounted pay in the army depends not upon keeping or riding a horse but upon being officers of certain staff or other designated classes.

The Navy Personnel Act gives to naval officers the pay of army officers "provided by or in pursuance of law." This includes not only the pay granted by direct statute but the pay allowed under the Army Regulations, in pursuance of law.

The equality of pay between the army and navy as fixed by the Personnel Act is intended to be a substantial equality. This can not exist unless under equivalent conditions in the two branches of the military service, the same pay is received. Army "pay and allowances" is made up of many different items. All these items (except forage) must be paid to the naval officer, or he will not have "the same pay and allowances" as given to the army officer.

The judgment of the Court of Claims is right and should be affirmed.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.